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UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

L&H Industrial, Inc.,

Plaintiff

v.

Premier Magnesia, LLC,

Defendant

Case No. 2:23-cv-00317-CDS-DJA

Order Denying Plaintiff's Motion for
Summary Judgment on Defendant's
Counterclaims

[ECF No. 40]

9 This is a breach of contract action between plaintiff L&H Industrial Inc. and defendant
10 Premier Magnesia, LLC. On March 1, 2023, L&H filed a complaint against Premier alleging that
11 Premier had failed to pay outstanding invoices relating to work L&H performed on Premier's
12 piece of equipment called "the 100 Crusher." Compl., ECF No. 1. On March 29, 2023, Premier
13 filed its answer and asserted a counterclaim against L&H alleging that L&H breached the
14 contract by failing to perform the work and provide the goods that the parties agreed to. Def.'s
15 Answer & Countercl., ECF No. 9. L&H filed its answer to the counterclaims on April 19, 2023.
16 Pl.'s Answer, ECF No. 16. Subsequently, L&H filed its motion for summary judgment on
17 Premier's counterclaims (Mot. Summ. J., ECF No. 40), Premier filed its response (Def.'s Resp.,
18 ECF No. 41), and L&H replied (Pl.'s reply, ECF No. 42). For the reasons set forth herein, I deny
19 L&H's motion for summary judgment on Premier's counterclaims.

20 I. Background

21 A. Premier's counterclaim¹

22 L&H is a company that provides for the repairing and manufacturing of heavy mining
23 equipment. ECF No. 9 at 10. Premier is a company that principally manufactures and supplies
24 high purity calcined magnesium oxide and magnesium hydroxide products. *Id.* at 9. To assist
25 with its mining and processing operations, Premier uses a piece of equipment called the 100

26
¹ Unless otherwise noted, the court only cites to the defendant's counterclaim to provide context to this
action, not to indicate a finding of fact.

1 Crusher. *Id.* The 100 Crusher is one hundred years old and requires specialized parts and
 2 maintenance services to ensure it remains in good working order. *Id.* In late 2020, Premier
 3 approached L&H and asked it to perform maintenance and repairs to the 100 Crusher
 4 equipment. *Id.* at 10. Premier alleges that its multiple purchase orders, together with L&H's
 5 multiple invoices, constitute the agreement between the parties. *Id.* Issues arose between the
 6 parties, culminating in L&H filing an action against Premier alleging (1) breach of contract, (2)
 7 unjust enrichment, and (3) accounting. ECF No. 1 at ¶¶ 13–26. In response, Premier asserts three
 8 counterclaims: (1) breach of contract, (2) breach of warranty, and (3) unjust enrichment. ECF
 9 No. 9 at 15–17. Specifically, Premier alleges that L&H incorrectly installed certain parts of the
 10 100 Crusher and, separately, damaged certain parts of the 100 Crusher, requiring Premier to
 11 replace the parts. *Id.* at 10. Premier further alleges that these improper installations and damaged
 12 parts led to the 100 Crusher failing in March of 2022. *Id.* at 12. As a result of this failure, Premier's
 13 internal maintenance personnel repaired the 100 Crusher and had to purchase additional parts
 14 from other vendors. *Id.* at 13. As a result, Premier was unable to use the 100 Crusher so it was
 15 forced to rent temporary replacement equipment. *Id.*

16 After the machine failure, Premier alleges that L&H performed an “inspection,
 17 rebabbing, and rebuild of the eccentric.” *Id.* at 14. After L&H performed this work, the 100
 18 Crusher failed for a second time in November 2022. *Id.* Premier alleges that the cause of this
 19 failure was caused by a malfunction of the babbitted surface of the eccentric due to L&H's
 20 “unacceptable, unsatisfactory, and substandard pour quality.” *Id.* Premier further alleges that the
 21 second 100 Crusher failure required it to purchase additional parts and repair services from
 22 other vendors, and it was yet again required to rent temporary replacement crusher equipment.
 23 *Id.*

24 **B. L&H's motion for summary judgment on Premier's counterclaims**

25 L&H filed a motion for summary judgment on Premier's counterclaims arguing that
 26 Premier “fundamentally ignores the clear and unambiguous language contained in the

1 quotations, orders, order acknowledgements and invoices between the parties, which limits
 2 both the duration of and remedies for L&H's limited warranty." ECF No. 40 at 1-2 (internal
 3 parenthetical omitted). L&H also argues that Premier's unjust enrichment count is precluded as
 4 a matter of law. *Id.*

5 In its response, Premier states that the crux of L&H's arguments regarding Premier's
 6 breach of contract and breach of warranty claims is that L&H's limited warranty was made part
 7 of the contract between Premier and L&H as an additional term under section 2-207(2) of the
 8 Uniform Commercial Code (UCC). ECF No. 41 at 8-9. Premier argues that (1) under the choice
 9 of law clause in its own terms and conditions, the contract is governed by North Carolina
 10 common law and not the UCC, the Limited Warranty was not part of the contract and (2) even
 11 if the UCC applies, there is a genuine issue of material fact as to whether the Limited Warranty
 12 satisfies section 2-207(2). *Id.* at 9-18. Premier also argues that its unjust enrichment
 13 counterclaim is premised on conduct outside the scope of the parties' contract, and thus not
 14 precluded as a matter of law. *Id.* at 27-29.

15 **II. Legal standard**

16 Summary judgment is appropriate when the pleadings and admissible evidence "show
 17 that there is no genuine issue as to any material fact and that the movant is entitled to judgment
 18 as a matter of law." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986) (citing Fed. R. Civ. P. 56(c)).
 19 At the summary-judgment stage, the court views all facts and draws all inferences in the light
 20 most favorable to the nonmoving party. *Kaiser Cement Corp. v. Fishbach & Moore, Inc.*, 793 F.2d 1100,
 21 1103 (9th Cir. 1986). If reasonable minds could differ on material facts, summary judgment is
 22 inappropriate because its purpose is to avoid unnecessary trials when the facts are undisputed;
 23 the case must then proceed to the trier of fact. *Warren v. City of Carlsbad*, 58 F.3d 439, 441 (9th Cir.
 24 1995); *see also Nw. Motorcycle Ass'n v. U.S. Dep't of Agric.*, 18 F.3d 1468, 1471 (9th Cir. 1994). Once the
 25 moving party satisfies Rule 56 by demonstrating the absence of any genuine issue of material
 26 fact, the burden shifts to the party resisting summary judgment to "set forth specific facts

1 showing that there is a genuine issue for trial." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256
 2 (1986); *Celotex*, 477 U.S. at 323. "To defeat summary judgment, the nonmoving party must
 3 produce evidence of a genuine dispute of material fact that could satisfy its burden at trial."
 4 *Sonner v. Schwabe N. Am., Inc.*, 911 F.3d 989, 992 (9th Cir. 2018).

5 **III. Discussion**

6 **A. Genuine issues of material fact exist as to whether L&H's Limited Warranty is
 7 part of the contract.**

8 L&H argues that the plain language of the agreements² reflects L&H's disclaimer of
 9 certain warranties and limitation of remedies. ECF No. 40 at 14. Specifically, L&H argues that
 10 (1) the UCC governs this contract and (2) L&H's terms and conditions of sale were
 11 incorporated in its "Quotes, Order Acknowledgements, and Invoices," and Premier never
 12 objected to the terms nor countered them. *Id.* In response, Premier disputes what agreement
 13 controls, and argues that (1) common law, not the UCC, governs the agreement, (2) this
 14 contract is governed by the law of North Carolina, not Nevada, and (3) even if the UCC applies,
 15 a genuine issue of material fact exists as to whether L&H's limited warranty became an
 16 additional term. ECF No. 41 at 2.

17 ***1. This is a mixed contract for services and goods.***

18 L&H argues that this contract is a contract for goods and is governed by the UCC,
 19 which has been codified in Nevada as Nevada Revised Statute (NRS) § 104. ECF No. 40 at 15.
 20 Under Nevada law, "between merchants[,"] a "definite and seasonable expression of acceptance
 21 or a written confirmation which is sent within a reasonable time operates as an acceptance even
 22 though it states terms additional to or different from those offered or agreed upon, unless
 23 acceptance is expressly made conditional on assent to the additional or different terms." NRS
 24 104.2207. The UCC applies to "transactions in goods[.]" NRS 104.2102.

25
 26 ² I refer to two agreements because at this time it is unclear as to whether L&H's terms and conditions or
 Premier's terms and conditions control.

1 L&H first argues that the UCC governs the contract because L&H and Premier are both
 2 merchants under the definition provided by NRS 104.2207. ECF No. 40 at 16. Premier does not
 3 dispute that it is a merchant as defined in the UCC. ECF No. 41 at 10–18. L&H next argues that
 4 the UCC governs the contract between L&H and Premier because “the repaired, refurbished
 5 and rebuilt parts for the 100 Crusher are indisputably “goods” under the UCC.” ECF No. 40 at
 6 15; *see* NRS 104.2105 (“Goods” means all things (including specially manufactured goods) which
 7 are movable at the time of identification to the contract for sale other than the money in which
 8 the price is to be paid”). In response, Premier argues that it hired L&H “not to provide
 9 replacement parts for the 100 Crusher, but [to] utilize their expertise to identify long-term
 10 maintenance and repair needs for the 100 Crusher and recommend and perform work it deemed
 11 necessary.” ECF No. 41 at 13. Stated otherwise, Premier hired L&H to perform a service (the
 12 maintenance and repair of the 100 Crusher), so in their view, this is a mixed contract for goods
 13 and services whose “predominant factor” is the provision of services with goods “incidentally
 14 involved.” *Id.* at 12.

15 I agree with Premier that this is a mixed contract for goods and services.³ The record
 16 reflects that L&H was asked to provide various “Crusher Assembly Parts.” *See generally*, Pl.’s Ex.
 17 14, ECF No. 40-16 at 2. This part of the contract undisputedly involves the sale of goods.
 18 However, the record also clearly shows that Premier hired L&H not just for their ability to
 19 procure parts, but for their expertise in the subject-matter and an “overhaul” of the 100 Crusher,
 20 which is a service. Haynes Dep, Def.’s Ex. A, ECF No. 41-2 at 41:5–7 (“L&H indicated clearly to
 21 us that they possessed the subject-matter expertise to design and lead the overhaul of this
 22 primary crusher.”). In his deposition, Premier’s company representative, Charles Matthew
 23 Haynes, states that Premier “had L&H come in, inspect, determine the work . . . that needed to
 24 be done, how to do it, and submit proposals.” *Id.* at 71:16–18. Haynes also states that “Premier
 25 contacted L&H to perform maintenance and repairs on its 100 Crusher equipment.” ECF No 41-

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 3 I make this finding pursuant to Federal Rule of Civil Procedure 56(g).

1 2 at 55:14–18. Further, in its own complaint, L&H identifies itself as being “engaged in the
 2 business of maintaining and repairing equipment and machinery utilized in the mining, energy
 3 aggregate and railroad industries.” ECF No. 1 at ¶ 6. All of this clearly demonstrates that both
 4 services and the sale of goods were involved in the contract between L&H and Premier.

5 To determine whether the UCC or common law applies, I would typically apply Nevada
 6 substantive law. *See Goldberg v. Pacific Indem. Co*, 627 F.3d 752, 755 (9th Cir. 2010) (“under *Erie* . . .
 7 federal courts are to apply state substantive law . . . to diversity cases” (citation omitted).
 8 However, when contracts include a choice-of-law clause it is typically enforced. *See Batchelder v.*
 9 *Kawamoto*, 147 F.3d 915, 918 (1998) (“contractual choice-of-law clauses are routinely enforced. . .
 10 .”). However, the crux of the issue between the parties is that it is unclear what terms and
 11 conditions are part of the contract. Each party’s terms and conditions include a choice-of-law
 12 clause. But neither party has provided sufficient information in their briefings to allow the court
 13 to resolve which choice-of-law clause should control. Subsequently, it is unclear whether this
 14 case should be analyzed under North Carolina or Nevada law and consequently, whether a
 15 mixed contract for goods and services should be governed under common law or the UCC.

16 If I apply Nevada law, it is likely that I would consider the case to be governed under the
 17 UCC. In *Peri & Sons v. Trical, Inc.*, the Ninth Circuit indicated that Nevada law would apply the
 18 UCC to a mixed contract for both goods and services. 1993 U.S. App. LEXIS 17454, at *4 (9th
 19 Cir. July 8, 1993) (“the modern trend is to apply Article 2 to mixed sale and services contracts”).
 20 In *Peri & Sons*, the Ninth Circuit cited to a Supreme Court of Nevada case, *Worrell v. Barnes*, 484
 21 P.2d 573 (Nev. 1971) *overruled on other grounds by Calloway v. City of Reno*, 993 P.2d 1259 (Nev. 1971),
 22 in support. 1993 U.S. App. LEXIS 17454, at *4. In *Worrell*, a contractor was hired to remodel the
 23 plaintiff’s home and installed a “leaky fitting” which subsequently caused a fire. 484 P.2d at 576.
 24 The court in *Worrell* held that the “leaky fitting” involved goods within the purview of the UCC.
 25 *Id.* The *Peri* court held that a proper reading of *Worrell* indicates that, under Nevada law, the
 26 UCC still applies to the sale of a product even when the plaintiff relies upon the services

1 rendered by the defendant when assessing the product and determining if it is suitable for a
 2 particular purpose. *Peri*, 1993 U.S. App. LEXIS 17454 at *7. This is the only case that provides
 3 insight into how Nevada law would treat a contract for mixed goods and services. However,
 4 given that the *Worrell* case is primarily a strict liabilities case, it is not analogous to the facts here.
 5 Moreover, that aged so I am not necessarily convinced that this is how the case should be
 6 analyzed under Nevada law today.

7 If I were to apply North Carolina law, I would employ the “predominant purpose” test to
 8 determine what law governs the contract. *Hensley v. Ray’s Motor Co. of Forest City*, 580 S.E.2d 721,
 9 724 (N.C. Ct. App. 2003). Determining the predominate purpose of a “mixed” contract often
 10 requires resolving issues of fact, “but whether a contract is predominantly one for goods or
 11 services is ultimately an issue of law.” *SiteLock LLC v. GoDaddy.com LLC*, 562 F. Supp. 3d 283, 300
 12 (D. Ariz. 2022). Under this test, if the predominant factor of a contract is services with the sale
 13 of goods incidentally involved, the contract is governed by common law. *Hensley*, 580 S.E.2d at
 14 724. However, if the predominant factor of a contract is the sale of goods with services
 15 incidentally involved, the contact is governed by the UCC. *Id.* According to *Hensley*, courts
 16 should look at three factors to determine whether a mixed contract should be governed by the
 17 UCC: (1) the language of the contract, (2) the nature of the business of the supplier, and (3) the
 18 intrinsic worth of the materials. *Id.* at 724–25. L&H argues that even if North Carolina law
 19 governs the contract, under the predominant purpose test, the UCC should still govern the
 20 agreement. ECF No. 42 at 7. At this time, I cannot determine the contract’s predominant
 21 purpose. The predominant purpose test requires the court to analyze the language of the
 22 contracts. *Hensley*, 580 S.E.2d at 724. Although the parties have both included various emails,
 23 quotes, and invoices signifying the relationship between them, neither party has made it clear
 24 which specific documents constitute “the agreement.” ECF No. 40; ECF No. 41. Thus it appears
 25 the question of which agreement(s) apply may turn on witness credibility, making summary
 26 judgment improper. See *United States v. Smith*, 538 F.2d 1359, 1363 (9th Cir. 1976) (“The credibility

1 of a witness' testimony is for a jury to decide, not a judge.). Because it is unclear which
2 agreement(s) controls and therefore which choice of law provision controls, there remain
3 outstanding genuine issues of material fact so I deny L&H's motion for summary judgment on
4 this claim.

5 **B. Premier's unjust enrichment claim is not precluded as a matter of law.**

6 Premier's unjust enrichment claim contains two allegations: (1) L&H retained
7 equipment and drawings which properly belong to Premier, and (2) L&H received payment for
8 work and materials which conferred no benefit to Premier and in fact caused substantial damage
9 to Premier's equipment. ECF No. 9 at 16–17. L&H argues that Premier's counterclaim for unjust
10 enrichment should be precluded as a matter of law because the counterclaim is predicated on
11 L&H's performance of its obligations under the agreement. ECF No. 40 at 22. In response,
12 Premier argues that the bases for its third counterclaim have no relation to the parties'
13 agreement. ECF No. 41 at 27. Specifically, Premier argues that L&H provides no evidence, other
14 than a self-serving affidavit, to support that it returned Premier's equipment and does not
15 provide any evidence demonstrating why it would be entitled to summary judgment on the issue
16 of the retained drawings of the 100 Crusher. *Id.* at 28. Premier further argues that there must be
17 an enforceable express contract between L&H and Premier as a matter of law to grant summary
18 judgment to L&H on Premier's unjust enrichment counterclaim. *Id.* Because there are genuine
19 issues of material fact regarding what terms and conditions supply the material terms of the
20 party's agreement, Premier argues that the court cannot find that an express contract exists as a
21 matter of law. *Id.* I agree. Both Nevada and North Carolina law hold that an action based on
22 unjust enrichment cannot lie when there is an express written contract. See *Leasepartners Corp. v.*
23 *Robert L. Brooks Tr.*, 942 P. 2d 182, 187 (Nev. 1997) ("an action based on a theory of unjust
24 enrichment is not available when there is an express, written contract"); *Intercollegiate Women's*
25 *Lacrosse Coaches Ass'n v. Corrigan Sports Enters., Inc.*, 694 F. Supp. 3d, 625, 682 (M.D.N.C. 2023) ("to
26 grant summary judgment on [an] unjust enrichment claim, an enforceable contract must exist as

1 a matter of law") (applying North Carolina law). Although the parties concur that they had an
 2 agreement, the terms of said agreement are in dispute. See ECF No. 9 at ¶ 11; ECF No. 16 at ¶ 11
 3 (both Premier and L&H state that there is an agreement between the parties). Because there is
 4 no dispute there is a contract between the parties, but the terms are in dispute, I cannot find
 5 that a clear, express written contract exists as a matter of law. Whether I apply North Carolina
 6 or Nevada law, Premier's motion for summary judgment on its unjust enrichment claim fails.
 7 Accordingly, it is denied.

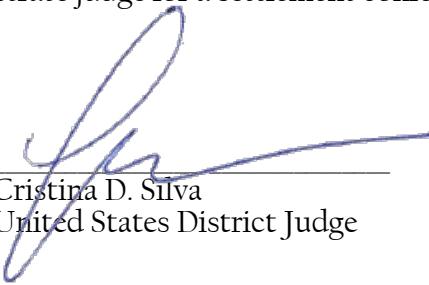
8 **C. The parties are directed to settlement.**

9 The parties are directed to attend a settlement conference before the assigned magistrate
 10 judge. Local Rule 16-5. Should settlement be unsuccessful, L&H must refile a summary
 11 judgment that addresses whether Nevada law or North Carolina law govern the contract and
 12 whether the UCC or common law govern the contract⁴ under Fed. R. Civ. P. 56(f). L&H's
 13 motion is due 30 days after the conclusion of the settlement conference, and any opposition or
 14 reply therefore are due in the accordance with the local rules. Premier's opposition must also
 15 address what state law governs the agreement(s).

16 **IV. Conclusion**

17 IT IS HEREBY ORDERED that L&H's motion for summary judgment [ECF No. 40] is
 18 DENIED. This matter is referred to the magistrate judge for a settlement conference.

19 Dated: September 30, 2024



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 21 Cristina D. Silva
 22 United States District Judge
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26 ⁴ I recognize that the deadline for dispositive motions has passed. However, should settlement prove
 unsuccessful, I will sua sponte extend the dispositive motions filing deadline. See *Gilbert v. Hearn*, 2021 WL
 3206830, at *2 (E.D. Cal. July 29, 2021).